NO. 88-1467

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1988

CREDIT BUREAU SERVICES - NEW ORLEANS
D/B/A CHILTON CORPORATION,
Petitioner

VERSUS

WEELAND L. HYDE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

When does the two year statute of limitations set forth in the Fair Credit Reporting Act, 15 U.S.C. Section 1681, *et seq,* commence to run?

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Respondent, Weeland L. Hyde, respectfully submits this Brief in opposition to the Petition for Writ of Certiorari filed herein by Credit Bureau Services - New Orleans d/b/a Chilton Corporation (hereinafter referred to as "Chilton").

STATEMENT OF THE CASE

The plaintiff, Weeland L. Hyde (hereinafter referred to as "Hyde") filed an action against Hibernia National Bank of Jefferson Parish (hereinafter referred as "Hibernia") and Chilton alleging that they had violated the Fair Credit Reporting Act by reporting information which they knew to be incomplete and inaccurate. The action was based upon a 1986 credit report issued by Chilton to Diner's

Club. On that 1986 report, there was an entry indicating that an amount had been charged to "P & L" by Hibernia. There is a long history between Hyde and Hibernia involving a loan to a corporation in which Hyde was a twenty-five percent stockholder. Hyde guaranteed the loan. Hyde has filed suit against Hibernia alleging a breach of contract in connection with certain actions taken by the Bank in connection with that loan. The action against the Bank is pending and is not material to this writ application.

Hyde was aware that the Bank had filed unfavorable information in his credit report with Chilton. However, there had been an ongoing dispute between the Bank and Hyde as a result of the loan. Even though he knew that the information was being reported, he did not take any legal action because he had not been denied credit as a result thereof. He had not been injured or damaged in any way by the bad report. However, in 1986 Hyde applied for a credit card from Diner's Club. Diner's Club requested a report from Chilton, which report was transmitted on October 21, 1986. As a result of the information contained in the credit report, Hyde was denied credit by Diner's Club on February 10, 1987.

After being denied credit, Hyde made written demand upon Chilton and Hibernia asking them to correct the information that was being reported in his credit file. Neither Chilton nor Hibernia took any action to make any corrections to Hyde's report.

The Fifth Circuit held that the statute of limitations provided in the Fair Credit Reporting Act begins to run when a report issued to a user causes injury to the consumer. The Court held that the tort is inchoate until the report is transmitted to a user, and thus, the date that the report is transmitted to a potential user is the date that triggers the commencement of the statute of limitations.

Further, the Court found that each new issuance of a credit report results in a distinct and separate injury, and is a distinct and separate tort to which a separate statute of limitations applies.

SUMMARY OF ARGUMENT

The Fair Credit Reporting Act provides a two year statute of limitations from the time that liability arises under the act. The statute does not define when liability arises, and Respondent submits that the statute of limitations should begin to run on the date that a report is transmitted to a user and causes injury to the consumer.

ARGUMENT

The statute of limitations should commence on the date that a report issued by a credit reporting agency causes injury to the consumer.

Section 1681(p) of Title 15 of the United States Code provides as follows:

> An action to enforce any liability created under this title [15 USCS 1681 *et seq.*] may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has

> materially and willfully misrepresented any information required under this title to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this title [15 USCS 1681 *et. seq.*], the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

The statute states that an action to enforce liability must be brought within two years from the date on which liability arises. Nowhere in the statute does it define when liability arises. Therefore, the question before this Court is that of when the statute of limitations commences to run.

In its Petition for a Writ of Certiorari, Chilton misstates the statute. Chilton says that the statute provides for a two year statute of limitations from the time that the credit reporting agency prepares the credit report. However, that is not how the statute is written, and Chilton cites no authority for its position.

Chilton would have this Court believe that there is a conflict in the Circuits on this issue. However, such is not the case. None of the cases cited by Chilton addresses the issue of the date on which the statute of limitations commences. Furthermore, Chilton has argued that the Fifth Circuit has fixed additional requirements on the Fair Credit Reporting Act. That is simply not true. The Fifth Circuit has only defined the date on which the statute of limitations begins, an issue which is not addressed by the statute. Respondent submits that the opinion of the Fifth Circuit is well reasoned, and that there is no reason for this Court to grant writs in this matter.

While it is true that Hyde knew that there was inaccurate information in his credit file as early as 1983, he was never damaged by that information. He had talked to Hibernia and to Chilton about the information, and had complained that it was inaccurate. However, he took no further steps at that time. There is no provision in the Fair Credit Reporting Act allowing him to file suit to demand that the inaccurate information be corrected.

In 1987, the information contained in his credit file resulted in his being denied credit when he applied for a credit card with the Diner's Club. In 1986, Chilton transmitted a credit report to Diner's Club, and on the basis of that report, Hyde was denied a credit card. It was at that point that Hyde was injured.

Hyde submits that liability arose at the time that he was injured by the action of the Defendants. Up until that time, he had not been injured.

> When an unlawful act does not immediately cause the injury sued for, but does so at a subsequent point of time, the plaintiff's cause of action does not accrue until injury has occurred. *Go-Tane Service Stations, Inc. v. Clark Oil & Refining Corporation*, 798 F2d 481, 486 (Em. App. 1986).

The Fair Credit Reporting Act was enacted by Congress to protect the consumer and to require that credit reporting agencies conform to reasonable procedures in their reporting of credit information. To begin the statute of limitations before any credit report is issued would appear to be inconsistent with the statute. Even if the consumer knows that there is erroneous information in a credit agency's files, he has no cause of action in tort until the agency actually injures him. There is no cause of action allowed by the statute simply because a credit reporting

agency has information in its files that is erroneous. No action lies unless the consumer has been damaged. Thus, to hold that the statute of limitations begins to run prior to the time of transmission of a credit report frustrates the whole purpose of a statute of limitations.

Respondent would also like to point out that Section 1681(c) of Title 15 allows a credit reporting agency to report an account charged to profit and loss for seven years. However, if Chilton's interpretation is accepted, the consumer is powerless to take any action against the credit reporting agency more than two years after the agency has received the bad information and placed it in the consumer's credit file. The agency would then be able to issue inaccurate credit reports for five more years and the consumer would be unable to do anything about it. Such a result is ludicrous.

In its Petition, Chilton has cited several cases for its proposition that the statute of limitations begins to run at the time that the credit reporting agency first receives the erroneous information. One case cited by Chilton is that of *Lawhorn v. Trans Union Credit Information Corporation, infra.* However, that case dealt with reports that had been issued to various retailers more than two years prior to the filing of the suit. The Court there also said:

> The preparation of each report without following reasonable procedures would constitute noncompliance with a requirement of the Act, and the date of the report would signal the beginning of the running of the statute of limitations. *Lawhorn v. Trans Union Credit Information Corporation,* 515 F. Supp. 19, 20 (E.D. Mo. 1981).

Thus, that case itself indicated that the statute of limitations would run from the time that each credit report

is issued. A second case submitted by the Petitioner is that of *Houghton v. Insurance Crime Prevention Institute*, 795 F.2d 322 (3rd Cir. 1986). In that case the complaint again was filed more than two years after the Plaintiff was injured. These cases did not deal with the date that the statute of limitations would commence. However, they did recognize that there was a two year statute of limitations.

CONCLUSION

The Respondent submits that there is no split of authority in the Circuit Courts, and that the decision of the Fifth Circuit is based upon sound legal reasoning. It does not extend the Fair Credit Reporting Act as Petitioner would have this Court believe. It is a well-reasoned opinion, and Respondent submits that Chilton's petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served on the 26th day of May, 1989, three copies of the foregoing upon the following, by depositing same in the United States Mail, postage prepaid and properly addressed.

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